

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BRIAN DAVID BOODY,

Defendant-Appellant.

UNPUBLISHED

May 15, 2014

No. 314418

Calhoun Circuit Court

LC No. 2012-002588-FC

Before: FITZGERALD, P.J., and SAAD and WHITBECK, JJ.

PER CURIAM.

A jury convicted defendant of first-degree criminal sexual conduct, MCL 750.520b(1)(a) (sexual penetration of an individual less than 13 years of age). The trial court sentenced defendant to a prison term of 25 to 60 years. Defendant appeals as of right. We affirm.

Defendant and his ex-girlfriend, HS, are the biological parents of the victim in this case. On Friday, June 1, 2012, defendant picked up the victim for his weekend visitation. The following day defendant took the victim to her aunt's home. While there, the victim disclosed to her cousin that defendant "sometimes touches her when she is in the shower or when she is getting out of the shower," and that such conduct had been occurring since she was four years old. After the victim's cousin notified the aunt, the victim made similar disclosures to the aunt. When HS subsequently picked the victim up from the aunt's house, the victim disclosed to HS that defendant had touched her "no-no parts" while she was drying off after a shower at defendant's home. HS took the victim to the emergency room that night. Chris Ann Leonard, a sexual assault nurse examiner, spoke with the victim, who told Leonard that "her vaginal area hurt after he [defendant] touched her with his middle finger when she went pee-pee." Approximately one week later, the victim was interviewed by Danielle Kostrab-Boyd, a forensic interviewer with the Child Advocacy Center. The victim told Kostrab-Boyd that there had been touching between her and defendant and that the touching had occurred more than once.

The victim testified that on the morning she went to visit her cousin she was in her bedroom at defendant's home drying off after a shower when defendant came in and touched her "no-no parts" (the part she urinates with) with his fingers. The prosecutor asked the victim if she felt her "no-no part" open while defendant was touching her, and she responded "yes." The victim asserted this was the only incident between her and defendant. Defendant testified that

the victim did not shower or bathe at his house on the weekend in question. He also denied ever touching the victim inappropriately.

Defendant argues there was insufficient evidence to support his first-degree CSC conviction. We review a challenge to the sufficiency of the evidence de novo. *People v Harverson*, 291 Mich App 171, 177; 804 NW2d 757 (2010). The test for determining such a challenge is “whether the evidence, viewed in a light most favorable to the people, would warrant a reasonable juror in finding guilt beyond a reasonable doubt.” *People v Nowack*, 462 Mich 392, 399; 614 NW2d 78 (2000). We draw all reasonable inferences in favor of the prosecution and defer to the trier of fact on all credibility determinations. *Id.* at 400.

To satisfy its burden of proof at trial, the prosecution was required to show (1) that defendant engaged in sexual penetration with the victim; and (2) that the victim was under 13 years of age. MCL 750.520b(1)(a); *People v Lockett*, 295 Mich App 165, 187; 814 NW2d 295 (2012). Additionally, because the prosecution sought the mandatory 25-year minimum sentence, it was required to show that defendant was 17 years of age or older at the time of the offense. MCL 750.520(2)(b). It is undisputed that the victim was under the age of 13 and that defendant was over the age of 17 at the time of the offense. Moreover, the prosecution presented sufficient evidence to allow a reasonable jury to conclude beyond a reasonable doubt that a sexual penetration occurred. “Sexual penetration,” as defined by the criminal sexual conduct statute, means “sexual intercourse, cunnilingus, fellatio, anal intercourse, *or any other intrusion, however slight*, of any part of a person’s body or of any object into the genital or anal openings of another person’s body” MCL 750.520a(r) (emphasis added); *Lockett*, 295 Mich App at 188. The victim testified that defendant touched her vagina with his fingers. The victim also testified that she felt her “no-no part” open while defendant was touching her. This testimony was sufficient to establish, at the least, that defendant penetrated the victim’s labia majora, which our Supreme Court has previously held is included within the statute’s definition of the female “genital opening.” See *People v Whitfield*, 425 Mich 116, 135 n 20; 388 NW2d 206 (1986) (citation omitted); see also *Lockett*, 295 Mich App at 188 (citation omitted). Although there were some inconsistencies between the victim’s testimony and the statements that she made to others, the jury had the “special opportunity to weigh the evidence and assess the credibility of the witnesses.” *People v Unger (On Remand)*, 278 Mich App 210, 228-229; 749 NW2d 272 (2008). It is apparent from their verdict that they resolved the inconsistencies in favor of a guilty verdict and we will not disturb that finding. *Id.* Viewed in a light most favorable to the prosecution, the evidence was sufficient to support a finding that defendant committed an act of sexual penetration upon the victim.

Defendant next argues the trial court erred in allowing the admission of other acts evidence. We review a trial court’s decision whether to admit evidence for an abuse of discretion, but review preliminary questions of law, such as whether a rule of evidence precludes admissibility, de novo. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). “A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes.” *People v Duncan*, 494 Mich 713, 722-723; 835 NW2d 399 (2013).

The challenged evidence relates to the testimony of defendant’s twin sisters, each of whom testified that defendant touched them inappropriately on multiple occasions in 2000 when they were approximately 12 years old. One sister testified that defendant often came into her

room at night when everyone else in the house was sleeping and touched her “stomach, hips, boobs, butt, whatever I had at the time.” She also testified that on one occasion defendant touched her vagina, underneath her underwear. The other sister testified to an instance when she was in defendant’s bedroom and defendant unbuttoned her pants and placed his hand inside. Defendant got “about half-way” down her pants, below her belly button but above her pubic area, before she stopped him. Defendant’s mother testified that both sisters disclosed this abuse to her before the allegations in this case surfaced.

Before the sisters testified, defendant objected to the admission of their testimony under MCL 768.27a. That statute provides, in part, that “in a criminal case in which the defendant is accused of committing a listed offense against a minor, evidence that the defendant committed another listed offense against a minor is admissible and may be considered for its bearing on any matter to which it is relevant.” Our Supreme Court has made clear that MCL 768.27a permits admission of propensity evidence that would otherwise be precluded by MRE 404(b). *People v Watkins*, 491 Mich 450, 470; 818 NW2d 296 (2012), citing MCL 768.27a.¹

Defendant was charged with committing first-degree CSC, a “listed offense” against a minor for purposes of MCL 768.27a. See MCL 768.27a(2)(a); MCL 28.722(k), (w)(iv); see also *People v Dobek*, 274 Mich App 58, 88 n 16; 732 NW2d 546 (2007). Moreover, the alleged other acts committed by defendant against his sisters met the criteria of a “listed offense” because that conduct would have constituted CSC-II, or at the very least, attempted CSC-II. See MCL 750.520c(1) (“A person is guilty of criminal sexual conduct in the second degree if the person engages in sexual contact with another person and . . . (a) that person is under 13 years of age”); MCL 750.520a(q) (“‘Sexual contact’ includes the intentional touching of the victim’s or actor’s intimate parts or the intentional touching of the clothing covering the immediate area of the victim’s or actor’s intimate parts”); MCL 750.520a(e) (“‘Intimate parts’ includes the primary genital area, groin, inner thigh, buttock, or breast of a human being”); MCL 28.722(k), (u)(ix) (A “listed offense” for purposes of MCL 768.27a includes CSC-II); MCL 28.722(u)(xi) (attempted CSC-II constitutes a “listed offense”). Accordingly, the other-acts testimony was admissible “for its bearing on any matter to which it [was] relevant.” MCL 768.27a(1); *Watkins*, 491 Mich at 470.

The evidence in this case was relevant to defendant’s propensity for sexually assaulting young females. See *Watkins*, 491 Mich at 470 (internal quotations and citations omitted) (“[A] defendant’s character and propensity to commit the charged offense is highly relevant because an individual with a substantial criminal history is more likely to have committed a crime than is an individual free of past criminal activity”). The evidence was also relevant to the victim’s credibility, which was placed at issue by defendant’s denial of the alleged conduct and the

¹ Defendant also argues that the other acts evidence was not admissible under MRE 404(b). However, because MCL 768.27a prevails over MRE 404(b), *Watkins*, 491 Mich at 473-477, a prosecutor need not also justify the admissibility of the other-acts evidence under MRE 404(b). Because the evidence was properly admitted under MCL 738.27a, we need not address this claim. *People v Buie (On Remand)*, 298 Mich App 50, 74; 825 NW2d 361 (2012).

elicitation of inconsistencies in the victim's story. See *Watkins*, 491 Mich at 450 n 92 (Other-acts evidence "tends to make the complainant's story more believable"). Finally, the probative value of the evidence was not substantially outweighed by the risk of unfair prejudice under MRE 403. "[W]hen applying MRE 403 to evidence admissible under MCL 768.27a, courts must weigh the propensity inference in favor of the evidence's probative value rather than its prejudicial effect[.]" and must not exclude the evidence "merely because it allows a jury to draw a propensity inference." *Watkins*, 491 Mich at 487. In conducting an MRE 403 balancing test, the trial court should consider several factors:

(1) the dissimilarity between the other acts and the charged crime, (2) the temporal proximity of other acts to the charged crime, (3) the frequency of the other acts, (4) the presence of intervening acts, (5) the lack of reliability of the evidence supporting the occurrence of the other acts, and (6) the lack of need for evidence beyond the complainant's and the defendant's testimony. [*Id.* at 487.]

Upon the admission of other acts evidence under MCL 768.27a, the trial court can also ensure the evidence is properly considered by issuing a limiting instruction to the jury. *Id.* at 490.

First, the charged and uncharged conduct was similar in that both consisted of defendant's opportunistic predation of young family members who knew and trusted him at times when no one else was present, and involved defendant's touching of the victim's intimate areas with his hands. Second, though the charged and uncharged conduct occurred approximately 15 years apart, "[t]he remoteness of the other act affects the weight of the evidence rather than its admissibility." *People v Brown*, 294 Mich App 377, 387; 811 NW2d 531 (2011). Third, the other acts were repeated and relatively frequent. Fourth, the sisters' testimony was reliable considering both testified to similar conduct occurring at the same age and their testimony was rendered credible by their mother's testimony that both sisters disclosed the conduct before the conduct in this case was disclosed. Fifth, there was a lack of physical evidence in this case and defendant vigorously challenged the victim's credibility; thus, there was a need for evidence beyond testimony from the victim and defendant. Finally, the trial court provided a limiting instruction about the other-acts evidence. Notably, the trial court's instruction erroneously limited the uses of the other-acts evidence for purposes other than showing propensity. This error, however, inured to defendant's benefit by further reducing the potential for prejudice. Accordingly, the trial court did not abuse its discretion by admitting the other acts evidence under MCL 768.27a.

Defendant next argues the trial court erred in allowing the hearsay testimony of Kostrab-Boyd regarding the victim's statement about the alleged conduct. Because defendant did not object to the challenged evidence at trial, this issue is unpreserved. *People v Jones*, 468 Mich 345, 355; 662 NW2d 376 (2003). We review unpreserved evidentiary challenges for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Hearsay is "a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c). "Hearsay is generally prohibited and may only be admitted at trial if provided for in an exception to the hearsay rule." *People v Gursky*, 486 Mich 596, 606; 786 NW2d 579 (2010); see also MRE 802.

The challenged evidence consists of Kostrab-Boyd's testimony that the victim told her there was touching between her and defendant and that the victim told her the touching happened more than once. Kostrab-Boyd's testimony regarding what the victim told her consisted of statements made by the victim "other than . . . while testifying at the trial or hearing." MRE 801(c). Moreover, the statements were "offered in evidence to prove the truth of the matter asserted." MRE 801(c). Therefore, the testimony was hearsay. The prosecution asserts, and defendant disputes, that the testimony could have been admitted as prior consistent statements under MRE 801(d)(1)(B), or in the alternative under MRE 803(A). Even assuming that the testimony was erroneously admitted, we conclude that reversal would not be required. Under the plain error standard, a defendant must show not only that plain error was committed, but also that the plain error affected the defendant's substantial rights; i.e., "that the error affected the outcome of the lower court proceedings," *Carines*, 460 Mich at 763-764. As a threshold matter, we note that portions of Kostrab-Boyd's testimony were consistent with the victim's testimony, while other portions, such as her statement that the victim told her the conduct occurred more than once, were inconsistent with the victim's testimony and therefore inured to defendant's benefit. Even as to that portion of Kostrab-Boyd's testimony that was consistent, no prejudice resulted because Kostrab-Boyd's testimony merely corroborated what the victim and others had already said and was therefore cumulative to the other evidence admitted at trial. See *Gursky*, 486 Mich at 621-623. Moreover, the victim testified and was subject to examination. Her testimony alone was sufficient to support defendant's convictions. MCL 750.520h; *Gursky*, 486 Mich at 623. Defendant cannot establish that the challenged testimony affected the outcome of the trial, and no reversal is warranted.

Finally, defendant argues that the mandatory 25-year minimum sentence for first-degree criminal sexual conduct constitutes cruel and/or unusual punishment under the Michigan and United States Constitutions. We rejected this same argument in *People v Benton*, 294 Mich App 191, 203-207; 817 NW2d 599 (2011). Both the doctrine of stare decisis and the Michigan Court Rules require us to adhere to *Benton's* holding. MCR 7.215(C)(2), (J)(1); *People v Waclawski*, 286 Mich App 634, 677; 780 NW2d 321 (2009). Accordingly, we conclude that defendant's argument lacks merit.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Henry William Saad
/s/ William C. Whitbeck